TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~300~~ 167

THE UNITED STATES, EX REL. AUGUSTUS O. BOURN, APPELLANT,

vs.

CHARLES GOODYEAR, JR., EXECUTOR OF CHARLES GOODYEAR, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 15, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 380.

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vs.

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A UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to forty-eight, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of the United States of America, ex rel. Augustus O. Bourn, against Charles Goodyear, jr., ex'r, &c., as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 2d day of Dec'r, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the said United States the ninety-third.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5-ct. int. rev. stamp canceled.]

1 In the circuit court of the United States for the south. district of New York.

THE UNITED STATES OF AMERICA, *ex rel.* Augustus O. Bourn,
vs.
CHARLES GOODYEAR, Jr., executor, &c.

To the honorable judges of the circuit court of the United States for the south. district of New York:

The United States of America, at the relation of Augustus O. Bourn, of the district and State of Rhode Island, a citizen of the said State of Rhode Island, complain of Charles Goodyear, jr., formerly of Stamford, in the State and district of Connecticut, and executor under the laws of the State of New York, of the last will and testament of Charles Goodyear, deceased, and now of New Rochelle, in the State of New York, a citizen of said State of New York.

And complaining, they show unto your honors, at the relation aforesaid, that before the fifteenth day of June, 1844, said Charles
2 Goodyear, deceased, a citizen of the United States, claiming to be the first and original inventor of a certain new and useful improvement in India-rubber fabrics, which he alleged had not been known or used before his invention thereof, and which was not, at the time of his application for a patent therefor, in public use, or on sale with his consent or allowance, and claiming to be such first and original inventor, and being desirous of obtaining an exclusive property in said invention, the said Goodyear made application in writing therefor to the Commissioner of Patents, expressing such desire, and delivered a written description of said invention or discovery, and a specification of the improvement by him claimed, whereupon such proceedings were had that, on the fifteenth day of June, 1844, letters patent of the United States, entitled for a new and useful improvement in India-rubber fabrics, signed by John C. Calhoun, Secretary of State, and countersigned and sealed with the seal of the Patent Office, by Henry L. Ellsworth, Commissioner of Patents, were issued to the said Charles Goodyear, deceased, granting to him, his heirs, executors, administrators, or assigns, for the term of fourteen years from the day of the date thereof, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof was annexed to and made a part of the said letters patent.

That afterwards the said Charles Goodyear surrendered the said last-mentioned letters patent to the Commissioner of Patents, and such proceedings were had that the said commissioner did, on the twenty-fifth day of December, 1849, reissue to the said Charles Goodyear, deceased, letters patent of the United States, entitled "for a new and useful improvement in processes for the manufacture of India rubber," signed by Thomas Ewing, Secretary of State, and countersigned and sealed with the seal of the Patent Office, by Thomas Ewbank, Commissioner of Patents, whereupon there was granted to the said Charles Goodyear, deceased, his heirs, executors, administrators, and assigns, for the term of fourteen years from the fifteenth day of June, 1844, (that being
3 the date of the said surrendered letters patent,) the full and exclusive right and liberty of making, constructing, using, and vending to be used, the said improvement, a description whereof was annexed to and made a part of the said reissued letters patent.

And the said United States, at the relation aforesaid, further show unto your honors that, on the fifteenth day of June, A. D. 1858, the Honorable Joseph Holt, Commissioner of Patents of the United States, did, as such commissioner, grant to said Goodyear an extension of said letters patent of June 15, 1844, as reissued December, 25, 1849, for the further term of seven years from the fifteenth day of June, A. D. 1858, and that the certificate and award of such extension were, by the said Commissioner, endorsed on the letters patent of which said extension was so granted.

And, on the information and belief of the relator aforesaid, they further show unto your honors, that subsequently, to wit, on the first day of June, 1860, said Charles Goodyear, senior, deceased, leaving a last will and testament, which was thereafter admitted to probate in the office of the surrogate of the city and county of New York, and the defendant, Charles Goodyear, jr., was confirmed and appointed as executor of said will, and letters testamentary were issued to him by said surrogate.

And, at the relation aforesaid, further showing, they state that subsequently and prior to the twentieth of November, 1860, the said Charles Goodyear, as executor, as aforesaid, on account, as he alleged, of a defective specification, surrender the said patent for improvement in processes for the manufacture of India rubber; and, thereupon, on the twentieth day of November, 1860, two new patents, bearing date the day and year last aforesaid, were issued to the said Goodyear, as executor as aforesaid, or his assigns, in two specifications by the said Goodyear made and filed; one for an improvement in caoutchouc, and one for an improvement in the art of preparing caoutchouc, each
4 of which last-named letters patent was issued for the then unexpired term of said extended patent; that is, for the term of twenty-one years from the aforesaid fifteenth day of June, 1844.

And further showing, on the information and belief of said relator, they charge and aver that the extension of said letters patent of the 15th of June, 1844, granted to said Goodyear, deceased, by the said Commissioner of Patents, was procured by the said Goodyear upon a false and fraudulent representation to the said commissioner, then made in that behalf, for the purpose of deceiving the said commissioner, and of obtaining the said extension, and in fraud of the requirements of the act of Congress of the United States, passed July 4, 1836, entitled "An act to promote the progress of the useful arts, and to repeal all acts and parts of acts heretofore made for that purpose," and of the provision of

the 18th section of said act, by which any patentee, making application for the extension of his letters patent, is required to furnish "a statement in writing, under oath, of the ascertained value of his invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him, from and by reason of said invention," for the purpose of s tisfying the Commissioner of Patents that the patentee, without neglect or fault on his part, has failed to obtain, from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed on the same, and the introduction thereof into use; that to obtain such extension, the said Goodyear, deceased, in the month of March, 1858, filed with the said Commissioner of Patents a petition, verified by him, the said Goodyear, deceased, in and by which it appeared that the expenditures of the said Goodyear in and about the said patent amounted to the sum of ninety-one thousand five hundred dollars over and above all his receipts derived from and by reason of his said patent, and of the invention thereby secured; that subsequently, and in the month of May, 1858, the said Goodyear, deceased, filed with the said Commissioner an amended application and account, in and by which it appeared
5 that the said Goodyear, deceased, had received, as profit accruing to him, from and by reason of said invention, the sum of thirty-three thousand three hundred fifty-eight dollars and sixty-three cents over and above all loss and expenditure sustained or made by him from and by reason of said invention; that the said Goodyear, deceased, for the purpose of deceiving the said Commissioner, and in violation of the statute aforesaid, omitted to include in said account the profits accruing to him, the said Goodyear, deceased, upon and by reason of various assignments and licenses made and granted by him, the said Goodyear, deceased, of rights to use the said improvement covered by said letters patent, and these defendants specify as assignments, licenses, and agreements, which were so made by the said Goodyear, deceased, and from which he derived a profit, the following, to wit:

An agreement and license with and to Horace H. Day, dated October 29, 1846, in which the said Goodyear, deceased, admits the receipt of ten thousand dollars, and in and by which it is stipulated that he shall be paid a tariff on all articles manufactured thereunder.

An assignment or license to James A. Dorr, dated October 8, 1844, in which the said Goodyear, deceased, admits the receipt of twenty-five thousand dollars.

An assignment or license to James A. Dorr, dated February 28, 1845, in which the said Goodyear admits the receipt of twenty-five hundred dollars.

An assignment or license or agreement with Bourn, Brown and Chaffee, dated March 27, 1851, in pursuance of which the complainants say, upon the information and belief of said relator, that the said Goodyear received property to the value of much more than ten thousand dollars, for which he, the said Goodyear, deceased, has never given any consideration, except the license or agreement as aforesaid.

6 An assignment or license given to Conrad Poppenhusen, dated March 22, 1852, in which the said Charles Goodyear, deceased, admits the receipt of ten thousand dollars.

An assignment or license to Conrad Poppenhusen, dated June 14, 1852, in which the said Goodyear, deceased, admits the receipt of twenty thousand dollars.

An assignment or license to Conrad Poppenhusen, dated January 12, 1853.

An assignment or license to Conrad Poppenhusen, dated September 30, 1823.

An assignment or license to Conrad Poppenhusen, dated January 14, 1854, ni which the said Goodyear, deceased, admits the receipt of one thousand dollars.

An assignment or license to Nelson Goodyear, dated January 30, 1852, in which the said Goodyear, deceased, admits the receipt of five hundred dollars.

An assignment or license to Nicholas Williamson and Dower D. Williamson, jr., dated June 9, 1854, in which the said Goodyear, deceased, admits the receipt of one thousand dollars.

An assignment or license to John C. Calhoun and Nicholas Williamson, dated May 23, 1854, in which the said Goodyear, deceased, admits the receipt of one thousand dollars.

An assignment or license to Newell A. Prince, dated October 17, 1854, in which the said Goodyear admits the receipt of one thousand dollars.

An assignment or license given to George Goodyear, dated May 18, 1855, in which the said Goodyear, deceased, admits the receipt of ten thousand dollars.

7 An assignment or license to Austin G. Day, dated October 17, 1854, in which the said Goodyear admits the receipt of ten thousand dollars.

An assignment or license to Gorham D. Abbott, dated July 2, 1856, in which the said Goodyear, deceased, admits the receipt of ten thousand dollars.

Two assignments or licenses to the Beacon Dam Company, a corporation created under the laws of the State of Connecticut, dated May 27, 1856, in one of which the said Goodyear, deceased, admits the receipt of ten thousand dollars.

An assignment or license to the said Beacon Dam Company, dated Oct. 22, 1856, in which the said Goodyear, deceased, admits the receipt of one dollar, which amount, at the relation aforesaid, they aver was inserted for the purpose of endeavoring to conceal the real amount received as such consideration, which they are informed and believe, and consequently aver, was as follows: Upon the execution and delivery of said instrument of October 22, 1856, the said Goodyear received from the said Beacon Dam Company the sum of one hundred and twenty-five thousand dollars, of which twenty-five thousand dollars were paid him, the said Goodyear, deceased, in cash or in negotiable promissory notes, all of which were paid at maturity, or shortly after; the balance thereof, to wit, one hundred thousand dollars, was paid him in stock of the said Beacon Dam Company, which, at that time, and at the time of the extension of said patent, was worth its par value in the market, and could have been readily sold therefor.

An assignment or license to Evan L. Evans, dated August 17th, 1857, in which said Goodyear, deceased, admits the receipt of $500.

An assignment or license or agreement with H. H. Day, dated May 24, 1858. That the said United States, complaining at the relation

8 aforesaid, are not informed as to the precise amount received by the said Goodyear as a present consideration for the granting of all of said assignments or licenses, nor as to the amounts received by him as and for tariffs from the grantees and licensees thereunder, except that the said relator is informed and believes that the said Goodyear, deceased, received, as tariffs from the said Beacon Dam Company, and its successor, the American Hard Rubber Company, prior to June 14,

1858, the sum of ten thousand dollars and upwards; and from the said Conrad Poppenhausen, and his licensees, as tariffs, one hundred and twenty thousand dollars; and from the said Austin J. Day, as tariffs, the sum of five hundred dollars; and, upon the information and belief of said relator, they aver that all of said receipts by said Goodyear, from the various grantees and licensees hereinbefore named, should properly have been included by him in said original and amended application and account for said alleged extension, and that, as they believe, the omission so to include the same renders the said alleged extension null and void, and deprives the said Goodyear, deceased, or his heirs, executors, or administrators, of any right under said original or reissued letters patent. And they aver that by the omission so to include the same the said Commissioner was deceived and fraudulently induced to grant said extension.

And on the information and belief of said relator, they further aver that said Goodyear, deceased, fraudulently and wilfully, in said original and amended accounts, presented to the said commissioner, misrepresented many of the items therein contained, and they specify as items which were so misrepresented the following to wit:

An assignment or license to Charles Ely and Edward Crane, dated October 29, 1847, for which, in said amended account, the said Goodyear, deceased, admits the receipt of four thousand dollars, but for which this relator is informed and believes he received the sum of five thousand dollars.

9 An assignment or license to Jonathan Trotter, dated February 5, 1847, for which, in said amended account, the said Goodyear, deceased, admits the receipt of seventy-five hundred dollars, but for which this relator is informed and believes he received the sum of ten thousand dollars.

An agreement with the Boston Belting Company, dated April 11, 1851, under which the said Goodyear, deceased, in his amended account, admits the receipt of eleven thousand dollars, but under which this relator is informed and believes he received the sum of fifteen thousand dollars.

An assignment or license to W. Rider & Brothers, dated March 28, 1847, for which the said Goodyear, deceased, in his amended account, admits the receipt of ten thousand dollars, but for which this relator is informed and believes he received the sum of thirty thousand dollars.

A license or agreement to Fowler M. Ray, dated February 5, 1851, for which said Goodyear, deceased, admits, in his amended account, the receipt of two thousand dollars, but for which this relator is informed and believes he received the sum of twenty-five hundred dollars.

From tariffs and settlements with the Union Rubber Company and the Boston Belting Company, the said Goodyear, deceased, in said amended account, admits the receipt of thirty-three thousand dollars; but the said United States, complaining as aforesaid, are informed and believe that he received not less than fifty thousand dollars therefor; and the United States, complaining at the relation aforesaid, as they believe, allege that the misrepresentation of the aforesaid items in said original or amended application for said alleged extension, renders the said alleged extension null and void, and deprives the said Goodyear, deceased, his heirs or executors, of any right under said original or reissued letters patent. And further showing, on the information

10 and belief of said relator, they aver that in said original and amended application, the said Goodyear, deceased, represented to the Commissioner of Patents that he paid certain debts and expenses, prior to 1845, amounting to the sum of seventy-nine thousand

two hundred and ten dollars forty-six cents, for expenses incurred in his alleged new vulcanizing process; all of which were paid, as he alleged to the said Commissioner, from the proceeds of said vulcanizing patent; which allegation this relator, upon information and belief, avers to be false in these particulars, to wit: That during said period, prior to 1845, the said Goodyear, deceased, was engaged in a great many experiments on objects entirely distinct from the vulcanization of India rubber, for some of which letters patent were issued to him; one bearing date March 9, 1844, and one, as said Goodyear, deceased, alleges in his application for a reissue of his patent in 1849, for fibrous India rubber, erroneously included in said alleged patent of June 15, 1844; that on both these patents he spent large amounts of time and money, and especially on his alleged discovery in incorporating fibrous substances with India rubber; that at least one-half of said debts and expenses should have been charged to these two alleged improvements, as this relator has been informed and believes he received considerable sums for their sale.

And, on the information and belief of said relator, they aver that, in said original and amended accounts, the said Goodyear, deceased, fraudulently and wilfully represented to the Commissioner of Patents that one quarter of all his receipts should be charged to the account of certain letters patent granted to Nathaniel Hayward and Edwin M. Chaffee, while he omitted to deduct one quarter from his debts and expenses, averred to be paid by him, and while he well knew that for neither of these patents had he ever made any charge to his licensees; that, on or about the third of November, 1854, the said Goodyear, deceased, James A. Dorr, and William Judson brought a certain bill in equity in the superior court of the city of New York, in which the complainants alleged, upon oath, that the said Goodyear, deceased,

11 "made no charge or demand to his licensees, as owner of said Chaffee patent, for using the same in the manufacture of India-rubber goods, and that no specific mention was made in any license by said Goodyear to his licensees, of said process of said Chaffee, or of any right, license, or permission to construct or use the same, and that he held the said Chaffee patent as a mere incident of the vulcanizing patent, and never designed to charge, and never did charge, any persons anything whatsoever for the use thereof;" that said Hayward patent expired in the year 1852; that previous to its expiration the said Goodyear, deceased, never received, directly or indirectly, any compensation therefor from any of his licensees for using his vulcanizing process, and that the same was never supposed, by any of his licensees, to have been paid for by them. And, upon the information and belief of said relator, they aver that, in said original application and in the testimony and arguments used before the said Commissioner of Patents, it was alleged by the said Goodyear, deceased, and his counsel, that the said Goodyear, deceased, had expended, in conducting lawsuits to sustain said vulcaniziing patent, large sums of money, which, in some places, are stated to be from one hundred and fifty to two hundred thousand dollars, which allegation, upon the information and belief of said relator, they aver to have been wrong and fraudulent; that during the existence of the original patent of said Goodyear, deceased, and before the application for the aforesaid alleged extension, there was a large fund, set apart and contributed by the licensees of said Goodyear, deceased, for the purpose, among others, of sustaining his said vulcanizing patent, and that all the expenses incurred in said lawsuits were paid by his licensees, and not by himself.

And they aver that, by the several misrepresentations aforesaid, the

said commissioner was deceived, and fraudulently induced to grant said extension.

And, upon the information and belief of said relator, they aver
12 that the said pretended extension of said letters patent was fraudulent and void in this, that the application for said extension, although made in the name of said Goodyear, deceased, and ostensibly for his benefit, was, in truth and in fact, made by a combination and confederacy, embracing a large portion of the licensees of said Goodyear, for the purpose of continuing in their hands a profitable monopoly in the manufacture of India-rubber goods; that the licensees of said Goodyear, deceased, had the exclusive management and control of the application for said extension, and, before the same was granted, secured to themselves the said monopoly in the event that the said extension should be granted; that they paid the expenses of said application; and these defendants aver that the said licensees, with the knowledge and consent of the said Goodyear, deceased, for the purpose of fraudulently procuring the Commissioner to grant said extension, paid large sums of money and other valuable considerations to sundry persons to induce them to withhold and withdraw opposition to said extension, and thereby wilfully and fraudulently caused the suppression of facts, which, if made known to said Commissioner, would have justly and legally prevented said extension, to wit, the fact well known to the licensees and to the said Goodyear, deceased, that the said Goodyear had, before that time, obtained from the sale and use of his invention a full, ample, and reasonable remuneraiion for the time, ingenuity, and expense bestowed upon the same, and the introduction into use; and that the said licensees, with the knowledge and consent of said Goodyear, deceased, for the purpose of fraudulently procuring the said extension, by inducing the Commissioner to believe that a real opposition was made to such extension, when, in fact, as they well knew, the same was only pretended, after having procured one Horace H. Day, for money or other valuable consideration, to withhold and withdraw his actual opposition to the said extension, fraudulently and collusively procured, the said Day, while he aided the extension in such manner as was thought most effective at the time, to continue his name upon the record, and to con-
13 tinue to take testimony, pretendedly in opposition to said extension; portions of which testimony were used by said Goodyear and his counsel in aid of such extension, for the fraudulent purpose of inducing the Commissioner to believe that all the facts which could be adduced in opposition to the said extension were brought to his notice; whereby said Commissioner was deceived and fraudulently induced to grant said extension.

And they aver that the said reissues granted to said defendant, Charles Goodyear, jr., executor, as aforesaid, are, by reason of the fraud practiced in obtaining the extension aforesaid, wholly and absolutely null and void.

And the United States had well hoped that no disputes would have arisen, but the defendant would have complied with the reasonable requests, often made to him, to surrender the said extension of the said letters patent as in conscience and equity he ought to have done.

But now, so it is, may it please your honors that the defendant, contriving how to wrong and injure the United States and the citizens thereof, absolutely refuses to comply with such request, and pretends that such extension was not fraudulent and said two new reissued letters patent are valid.

All which acting, doings, and pretences are contrary to equity, and tend to the manifest wrong of the United States and the good citizens

thereof, and forasmuch as the United States are remediless at law and can only have relief in equity:

To the end, therefore, that the said Charles Goodyear, executor, may, on oath, answer all and singular the premises, and that the extension on the 15th day of June, A. D. 1858, granted by the Honorable Joseph Holt, Commissioner of Patents of the United States, to the said Goodyear, of said letters patent of June 15, A. D. 1844, as reissued Dec.
14 25, 1849, for the further term of seven years from the 15th day of June, A. D. 1858, may be declared to be fraudulent and void by reason of the fraud practiced upon the said Commissioner of Patents in the procurement of the same, and that the said two new patents bearing date on the 20th day of November, A. D. 1860, issued to the said Charles Goodyear, executor, as aforesaid, may be declared fraudulent and void by reason of the fraud practiced upon the Commissioner of Patents in the procurement of the extension aforesaid; and that the said Charles Goodyear, executor, as aforesaid, may be ordered and decreed to deliver the said two new letters patent and the certificate and award of such extension to the United States to be cancelled, and that the same may be cancelled and the said United States may have such other and further relief in the premises as to your honors may seem meet.

May it please your honors to grant unto the said United States a writ of subpœna of the United States, to be directed to the said Charles Goodyear, executor, as aforesaid, commanding him, at a certain day and under a certain penalty, personally to be and expose before your honors, in this honorable court, and there and then to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your orator shall ever pray.

F. N. BANGS, *Solicitor.*

J. H. PARSONS,
A. PAYNE,
C. CUSHING, *of Counsel for Relator.*

15 UNITED STATES OF AMERICA,
Southe. Dist. of New York, ss:

Augustus O. Bourn, being duly sworn according to aw, doth depose and say that he is the relator named in the foregoing bill of complaint; that he has read the said bill and knows the contents thereof; that the matters and things contained & set forth therein, so far as they relate to his own acts and deeds, are true, and so far as they relate to the acts and deeds of other persons he believes them to be strictly true.

AUGUSTUS O. BOURN.

Sworn to before me this 15 day of June, 1865.

[L. S.] C. W. BANGS,
Notary Public, N. Y. City.

16 (Indorsed:) U. S. circuit court. The United States, ex rel Bourne, ag't Charles Goodyear, jr. Bill. F. N. Bangs, sol'r for compl'ts.

Filed June 15, 1'65.

17 The President of the United States of America to Charles Goodyear, jr., executor, &c., greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, in equity, on the first Monday of August, A. D. 1865, wheresover the said court shall then be, to answer a bill of complaint exhibited against you in the said court by

the United States of America ex rel. Augustus O. Bourn, and to do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New York, on the 15th day of June, in the year one thousand eight hundred and sixty-five, and of the independence of the United States of America the eighty-ninth.

KENNETH G. WHITE, *Clerk.*

F. N. BANGS, *Sol'r.*

The defendant is required to enter appearance in the above cause in the clerk's office of this court, on or before the first Monday of August, 1865, or the bill will be taken pro confesso against him.

[L. S.] K. G. W., *Clerk.*

[50-ct. int. rev. stamp, can'lled.]

I hereby depute C. W. Bangs & Geo. Rhame, or either of them, to execute the within process.

R. MURRAY, *U. S. Marshal.*

JUNE 15, '65.

18 Personally served on the within-named def't, June 15, 1865.

R. MURRAY, *U. S. Marshal.*

DEC. 4, '68.

19 Circuit court of the United States of America, southe. dist. of New York.

THE UNITED STATES OF AMERICA, *ex rel.* Augustus O. Bourn, *vs.* CHARLES GOODYEAR, Jr., ex'r, &c.

SIR: Please to take notice that the defendant, Charles Goodyear, jr., appears in this suit, and that I am retained as solicitor for him therein, and you are hereby requested to enter such appearance.

Dated New York, Aug. 7, 1865.

Yours, &c.,

WM. E. CURTIS,
Defendant's Sol'r, 106 *Broadway, New York.*

To. K. G. WHITE, Esq., *Clerk.*

(Endorsed:) Filed Aug. 7, '65.

20 In the circuit court of the United States for the southern district of New York, second circuit.

THE UNITED STATES OF AMERICA, *ex rel.* Augustus O. Bourn, *vs.* CHARLES GOODYEAR, Junior, executor of the last will and testament of Charles Goodyear, dec'd. } In equity.

The demurrer of Charles Goodyear, jr., executor of the last will and testament of Charles Goodyear, dec'd, to the bill of complaint of the United States of America ex rel. Augustus O. Bourn.

This defendant by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true, in

manner and form as the same are therein related, set forth, and alleged, doth demur to the said bill, and for cause of demurrer shows—

1st. That the said complainant, at the relation aforesaid, hath not by the bill aforesaid, made a case in equity whereon this court can ground any decree, or give the complainant, at the relation aforesaid, any relief or assistance, as against this defendant.

2d. That the matters and things related, set forth, alleged, complained of, and prayed for in the said bill of complaint, are not within the jurisdiction of this honorable court, nor cognizable by any municipal court of justice.

21 3d. That it appears, from the complainant's own showing in the bill aforesaid, that the alleged cause of action in the said bill set forth did not accrue or arise, nor did any discovery of the said complainant or the said relator, of the facts constituting such supposed cause of action or any of them, happen within five years next before the commencement of this suit, or the exhibition or filing of the said bill, or of the sueing out or service of any process against this defendant, concerning the same supposed cause of action.

4th. That it appears, by the complainant's own showing, at the relation aforesaid, in the bill aforesaid, that the term for which the said several letters patent in the bill mentioned and sought to be cancelled were granted, had expired before the commencement of this suit.

Wherefore, and for other good causes of demurrer appearing in the said bill, this defendant demurs thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any further and other answer to the said bill; and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

CHAS. GOODYEAR, JR.

WM. E. CURTIS, *Solicitor for the Defendant.*
SAM'L A. FOOT, *of Counsel for the Defendant.*

The undersigned hereby certifies that in his opinion the fore-
22 going demurrer is well founded in point of law.

SAM'L A. FOOT,
Of Counsel for the Defendant.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

On this second day of November, A. D. 1865, before me came the above-named defendant, Charles Goodyear, junior, who, being duly sworn, makes oath and says that the foregoing demurrer is not interposed for delay.

[SEAL.]

JAMES S. STEARNS,
Notary Public for County of New York.

(Indorsed:) U. S. circuit court, southern district of New York, second circuit. United States, ex rel. Augustus O. Bourn, vs. Charles Goodyear, jr., ex'r, &c. Copy demurrer. Wm. E. Curtis, def't's sol'r. Rec'd Nov. 6, 1865. To F. N. Bangs, esq'r, plaintiff's solicitor.
Filed Nov. 6, '65.

Please take notice that within is a copy of a demurrer in this suit this day duly filed in the office of the clerk of this court.

Dated New York, November 6th, 1865.

Yours, &c.,

WM. E. CURTIS, *Def't's Sol'r.*

23 Southern district of New York.

THE UNITED STATES OF AMERICA,
ex relatione. A. O. Bourn,
vs.
CHARLES GOODYEAR JR., EX., &c.

To the honorable judges of the circuit court of the United States for the southern district of New York:

Augustus O. Bourn, the relator in the above entitled suit, respectfully prays that he may amend the bill heretofore filed at his relation, as follows:

The said United States, at the relation aforesaid of the said Augustus O. Bourn, further show, that the said relator made application by memorial that he would cause, permit, or consent to the initiation of proceedings, having for their object the same as that sought to be accomplished by this bill of complaint, in the name of the United States.

That said memorial was afterwards, under instructions from the said Attorney General, sent to the Commissioner of Patents, and copies of the said memorial of the letter of the Attorney General to the counsel of this relator, and of the letter of said Attorney General to the Commissioner of Patents, referring the said memorial to him, and of the reply of said Commissioner of Patents to the Attorney General, this relator annexes hereto and makes part hereof.

24 And this relator further shows to your honor and avers that, supposing Charles Goodyear to be a citizen of Connecticut, this relator on the 15th day of May, A. D. 1865, filed a bill in equity precisely similar to the bill filed in the clerk's office of this court, to which the matters herein stated are in amendment, in the office of the clerk of the circuit court of the United States for the district of Connecticut. And that the said defendant Goodyear, executor, &c., filed in answer thereto a motion to dismiss the said bill, on the ground that he has at the time of the filing thereof, and had for sometime previous, been a citizen of the State of New York. And the said suit was afterwards withdrawn. And the facts shown to your honor and averred by the relator will more fully appear from a transcript of the record of said circuit court of the United States for said district of Connecticut, to be produced by this relator, the same to be under the seal of said court and duly certified as such transcript by the clerk thereof.

A. O. BOURN,
By his attorney, J. H. PARSONS.

U. S. PATENT OFFICE,
May 15th, 1863.

SIR: In reply to yours of 5th inst., copies of the papers in the case are herewith enclosed. The fee for same is , which please remit in government funds.

Respectfully, &c.,

D. P. HOLLOWAY, *Com'r.*

A. PAYNE, *Providence, R. I.*

25 The U. States Patent Office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed are true copies from the files of this office.

In testimony whereof, I, D. P. Holloway, Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this thirteenth day of May, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

[L. S.] D. P. HOLLOWAY.

U. S. PATENT OFFICE,
Washington, D. C., March 10, 1865.

SIR: I have the honor to acknowledge the receipt of your communication of the 28th ult., enclosing the memorial of A. O. Bourn, praying the Attorney General of the United States to cause, permit, or consent to the initiation of proceedings in the name of the United States for the repeal of the renewal and extension of the Goodyear patent, either by scire facias or bill in equity.

I do not hesitate to express the opinion that a favorable consideration of this memorial would be in opposition to the manifest interest and policy of the patent laws of the United States, would be unauthor-
26 ized by a single precedent, and would be eminently impolitic and unjust.

I shall have the honor, at an early day, to submit to you my views at length upon this question. Permit me to express my obligations for your courtesy in submitting to my consideration a question so important to the interests specially entrusted to this office.

I have the honor to be, very respectfully, your obedient serv't,
D. P. HOLLOWAY, *Com'r.*

Hon. JAMES SPEED, *Attorney General.*

[Copy.]

ATTORNEY GENERAL'S OFFICE,
Washington, D. C., Feb'y 28, 1865.

SIR: Your letter of the 20th reached me this morning. I had received one a day or two ago from A. Payne, esq., of Providence. A memorial of Mr. Augustus O. Bourn, of Rhode Island, was received with each letter.

I think that a bill in equity will lay to vacate a patent. Of this, however, I am not sure. Is it clear that our courts have more than the mere equity powers of the chancellor of England? Have they the regular and proper chancery powers of the high court of chancery of England?

But, be this as it may, it seems to me that this department of
27 the government ought not to initiate a proceeding to have a grant vacated, except at the request of the Department of the Interior; otherwise the two departments might be brought in conflict upon questions of law or fact, or both.

In conformity with this view, I have referred your communication to the Commissioner of Patents.

I have the honor to be, with great respect, your obedient servant,
(Signed.) JAMES SPEED,
Attorney General.

Hon. CALEB CUSHING, *Boston, Mass.*

ATTORNEY GENERAL'S OFFICE,
Washington, Feb. 28, 1865.

SIR: The Attorney General requests me to send to you the enclosed memorial of Augustus O. Bourne, of Rhode Island, relative to the renewal

and extension of the Goodyear patent, together with a copy of his letter to Hon. Caleb Cushing, counsel of the memorialist, in which his reason for this reference to you of the enclosed memorial is set forth.

I am, very respectfully, your obedient servant,

HUBLEY ASHTON,
Assistant Attorney General.

Hon. D. P. HOLLOWAY,
Commissioner of Patents.

28 To the Hon. James S. Speed, Attorney General of the United States:

Your memorialist, Augustus O. Bourne, of Cranston, State of Rhode Island, respectfully represents that, on the 15th day of June, A. D. 1844, a patent was granted by the United States to Charles Goodyear, of New Haven, Conn., for an "improvement in India-rubber fabrics;" which patent was surrendered and reissued on the 25th day of December, A. D. 1849, in two separate patents, based on two separatea mended specifications, viz, one for "improvement in process for the manufacture of India-rubber," and the other for "improvement in felting India-rubber with cotton fibre;" and on the 14th day of June, A. D. 1858, the Commissioner of Patents of the United States, on the application of said Goodyear, did renew and extend the said patent, as reissued in said two patents, for the term of seven years from and after the expiration of the first term, viz., from June 15th, A. D. 1858, to June 15th, A. D. 1865.

That said renewal and extension of said patent were obtained by false and fraudulent representations, made by the said Goodyear to the said Commissioner of Patents; by a wilful and fraudulent suppression of material facts, which should have been communicated to the said Commissioner; and by connivance and collusion between the parties seeking,

29 and parties pretending to oppose, said extension, the specifications and progress of which fraud and collusion will appear in the transcript exhibited herewith, of the proceedings in the case hereinafter referred to of Goodyear, executor et al, vs. the Providence Rubber Co. et al.

That your memorialist is, and for a long time has been, extensively engaged in the manufacture of India-rubber goods, and that said fraudulent renewal and extension of the said patent is greatly prejudicial to him and to the public.

That at the November term, 1864, of the United States circuit court for the district of Rhode Island, in a certain suit in equity, then and there pending, wherein Charles Goodyear, executor of said Charles Goodyear, then deceased, and others were complainants, and the Providence Rubber Company, your memorialist, and others were defendants, for an infringement of said patent, the said defendants, among other defences, alleged that said renewal and extension of said patent were so obtained by frauds from said Commissioner; but said allegations were decided by said court to be no valid defense therein. The court (Justice Clifford) then said:

"Decision of the Commissioner was made by a tribunal with full powers to examine and decide, and inasmuch as there is no provision for an

30 appeal to any other jurisdiction, the decision must in general be regarded as final in all collateral proceedings." It may be inferred from the last expression, "collateral proceedings," that the court had in mind one of the direct remedies, by scire facias or bill in equity, hereinafter suggested, as the proper one for repealing a fraudulent patent.

That by the act of Congress, of February 21st, A. D. 1793, entitled "An act to promote the progress of the useful arts," &c., (section 10,) it was provided that the judge of the district court where the patentee, his executors, administrators, or assigns resided, might, upon due application and proof that a patent had been obtained under that act, surreptitiously, or upon false suggestion, render judgment for the repeal of such patent.—(See Law's Digest of Patent Laws, acts, page 40.)

That by the act of Congress, of July 4th, A. D. 1836, entitled "An act to promote the progress of the useful arts, and to repeal all acts and parts of acts heretofore made for that purpose," the aforesaid act of February 21st, A. D. 1793, was repealed, and the provision contained in said section 10 thereof was not re-enacted, and no statutory provision now exists for the repeal of patents obtained by fraud.—(See Law's Digest of Patents acts, page 48.)

That there appears to be no remedy in such case provided, whereby individuals or the public may be redressed in the matter of a fraud-
31 ulent patent, unless it be by scire facias, (as in England,) or by a bill in equity, in the name of the United States, to repeal the patent.

In England, scire facias is a writ of right for the repeal of fraudulent patents, for preventing multiplicity of suits, and for the general relief of the public. It is brought in the name of the Queen, on behalf of the individual aggrieved, or of the public; and "every person is presumed to have such an interest in a patent for an invention, that if he alleges that it is illegal or void, he is entitled as of right to a scire facias in the name of the Queen, in order to repeal it."—(See Hindmarch on Patents, title scire facias, section 6.)

As to the remedy of a bill in equity in the name of the United States, at its present term, (December 7, 1864,) in the case of Stone vs. the United States, (No. 71,) decided that this is the proper remedy for repealing a patent for land surreptitiously obtained. In that case the court said:

A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or title, until it is set aside or annulled by some judicial tribunals. In England this was originally done by scire facias; but a bill in chancery is found a more convenient remedy. Nor is fraud in the patentee the only
32 ground upon which a bill will be entertained.

Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or when another party has a higher equity and should have received the patent. In such case the courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially.

If he issues a patent for land reserved for (from?) sale by law, such patent is void, for want of authority; but one officer of the land office is not competent to cancel or annul the act of his predecessor; that is a judicial act, and requires the judgment of a court.

In connection with this case, I beg to call your attention to the opinion of your predecessor on the subject, and more especially to that of Mr. Attorney General Legare, which recognizes the right of redress in such case, either by scire facias or a bill in equity, but with inclination of opinion in favor of the latter.—(Opinions, Volume IV, page 120.)

33 Your memorialist therefore respectfully asks that you will cause, permit, or consent to the initiation of proceedings for his relief, and that of the public, in the name of the United States, for the repeal

of the renewal and extension of the said Goodyear patent so fraudulently obtained, by either scire facias or bill in equity, as in your judgment may seem best.

A. O. BOURN.

RHODE ISLAND DISTRICT, *ss:*

In the city of Providence, in said district, personally appeared A. O. Bourn, and made solemn oath that the facts and statements set forth in the above memorial are true, so far as they are stated of his own knowledge, and so far as they are stated on information and belief he believes them to be true.

Before me the 20th day of February, A. D. 1865.

JAMES H. PARSONS,
U. S. Commissioner for said R. I. District.

[Stamp: "J. W. S., Febr'y."]

Endorsed: Respectfully referred to the Commissioner of Patents.

JAMES SPEED, *Att'y General.*

34 Re-endorsed: Southern District of New York. The United States. ex relatione A. O. Bourn, ags't Charles Goodyear, jr., &c. Copy petition for leave to amend. F. N. Bangs, sol'r for plaintiff.

Let the bill be amended pursuant to the within petition, and the demurrer filed by the defendant stand as a demurrer to the amended bill.

Nov. 7, 1868.

CHAS. L. BENEDICT.

Rec'd March 28, 1866.

Filed Dec. 3, 1868.

35 United States circuit court.

THE UNITED STATES OF AMERICA,
ex rel. Augustus O. Bourne,
vs.
CHARLES GOODYEAR, Jr., executor, &c.

Amendments to bill of complaint.

Insert in the original bill after the words, "wholly and absolutely null and void," on page 13, Paragraph V, as follows: "The said United States, at the relation aforesaid Augustus O. Bourn, further show that the said relator made application by memorial to the Attorney General of the United States, requesting that he would cause, permit, or consent to the initiation of proceedings having for their object the same as that sought to be accomplished by this bill of complaint in the name of the United States; that said memorial was afterwards, under instructions from the Attorney General, sent to the Commissioner of Patents, and copies of the said memorial, of the letter of the Attorney General to the counsel of this relator, and of the letter of said Attorney General to the Commissioner of Patents, referring the said memorial to him, and
36 of the reply of said Commissioner of Patents to the Attorney General this relator annexes hereto, and makes part thereof.

And this relator further shows to your honors, and avers that supposing Charles Goodyear to be a citizen of Connecticut, this relator, on the fifteenth day of May, A. D. eighteen hundred and sixty-five, filed a bill in equity precisely simlilar to the bill filed in the clerk's office in this court, to which the matters herein stated are in amendment, in the office

of the clerk of the circuit court of the United States for the district of Connecticut. And that the said defendant Goodyear, executor, &c., filed, in answer thereto, a motion to dismiss the said bill on the ground that he was, at the time of the filing thereof, and had for some time previous been, a citizen of the State of New York; and the said suit was afterwards withdrawn. And the facts shown to your honor, and avered by this relator will more fully appear from a transcript of the record of said circuit court of the United States for the district of Connecticut, to be produced by the relator, the same to be under the seal of said court, and duly certified as such transcript by the clerk thereof.

37 U. S. PATENT OFFICE, *May* 15, 1865.

SIR: In reply to yours of 5th inst., copies of the papers of the case are herewith enclosed. The fee for same is which please remit in government funds.

Respectfully, &c.,

D. P. HOLLOWAY, *Com'r.*

A. PAYNE, *Providence, R. I.*

The United States patent office to all persons to whom these presents shall come, greeting:

This is to certify that the annexed are true copies from the files of this office.

In testimony whereof, I, D. P. Halloway, Commissioner of Patents, have caused the seal of the patent office to be hereunto affixed this thirteenth day of May, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

[L. S.] D. P. HALLOWAY.

38 U. S. PATENT OFFICE,
Washington, D. C., February 10, 1865.

SIR: I have the honor to acknowledge the receipt of your communication of the 28th ult., enclosing the memorial of A. O. Bourn, praying the Attorney General of the United States to cause, permit, or consent to the initition of proceedings in the name of the United States, for the repeal of the renewal and extension of the Goodyear patent, either by scire facias or bill in equity.

I do not hesitate to express the opinion that a favorable consideration of this memorial would be in opposition to the manifest interest and policy of the patent laws of the United States, would be unauthorized by a single precedent, and would be eminently impolitic and unjust.

I shall have the honor, at an early day, to submit to you my views at length upon this question. Permit me to express my obligations for your courtesy in submitting to my consideration a question so important to the interest specially entrusted to this office.

I have the honor to be, very respectfully, your obedient serv't,

D. P. HOLLOWAY, *Com.*

Hon. JAMES SPEED, *Attorney General.*

39 [Copy.]

ATTORNEY GENERAL'S OFFICE,
Washington, D. C., Feb'y 28, 1865.

SIR: Your letter of the 20th reached me this morning; I had received one a day or two ago from A. Payne, esq'r, of Providence. A memorial

of Mr. Augustus O. Bourne, of Rhode Island, was received with each letter.

I think that a bill in equity will lay to vacate a patent. Of this, however, I am not sure. Is it clear that our courts have more than the mere equity powers of the chancellor of England? Have they the regular and proper chancery powers of the high court of chancery of England?

But be this as it may, it seems to me that this department of the government ought not to initiate a proceeding to have a grant vacated, except at the request of the Department of the Interior; otherwise the two departments might be brought in conflict upon questions of law or fact, or both.

In conformity with this view, I have referred your communication to the Commissioner of Patents.

I have the honor to be, with great respect, your ob'd't serv't,

40 (Signed) JAMES SPEED,
Attorney General.

Hon. CALEB CUSHING, *Boston, Mass.*

ATTORNEY GEN'L'S OFFICE,
Washington, D. C., Feb. 28, 1865.

SIR: The Attorney General requests me to send to you the enclosed memorial of Augustus O. Bourne, of Rhode Island, relative to the renewal and extension of the Goodyear patent, together with a copy of his letter to Hon. Caleb Cushing, counsel of the memorialist, in which his reason for this reference to you of the enclosed memorial is set forth.

I am, very respectfully, your obedient servant,
HUBLEY ASHTON,
Assistant Attorney General.

Hon. D. P. HOLLOWAY,
Commissioner of Patents.

To the Hon. James S. Speed, Attorney General of the United States:

41 Your memorialist, Augustus O. Bourne, of Cranston, State of Rhode Island, respectfully represents that, on the 15th day of June, A. D. 1844, a patent was granted by the United States to Charles Goodyear, of New Haven, Conn., for an "improvement in India-rubber fabrics;" which patent was surrendered and reissued on the 25th day of December, 1849, in two separate patents, based on two separate amended specifications, viz., one for "improvement in process for the manufacture of India-rubber," and the other for "improvement in felting India-rubber with cotton fibre;" and on the 14th day of June, A. D. 1858, the Commissioner of Patents of the United States, on the application of said Goodyear, did renew and extend the said patent as reissued in said two patents, for the term of seven years, from and after the expiration of the first term, viz., from June 15th, A. D. 1858, to June 15th, A. D. 1865. That said renewal and extension of said patent were obtained by false and fraudulent representations made by the said Goodyear to the said Commissioner of Patents; by a wilful and fraudulent suppression of material facts, which should have been communicated to the said

42 Commissioner; and by connivance and collusion between the parties seeking, and parties pretending to oppose, said extension; the specifications and progress of which fraud and collusion will appear in the transcript exhibited herewith of the proceedings in the case hereinafter referred to of Goodyear, executor, et al., vs. the Providence Rubber Co. et al.

That your memorialist is, and for a long time has been, extensively engaged in the manufacture of India-rubber goods, and that said fraudulent renewal and extension of the said patent is greatly prejudicial to him and to the public.

That at the November term, 1864, of the United States circuit court for the district of Rhode Island, in a certain suit in equity, then and there pending, wherein Charles Goodyear, executor of said Charles Goodyear, then deceased, and others were complainants, and the Providence Rubber Company, your memorialist, and others were defendants, for an infringement of said patent, the said defendants, among other defences, alleged that said renewal and extension of said patent were so
43 obtained by fraud from said Commissioner; but said allegation was decided by said court to be no valid defense therein. The court (Justice Clifford) then said:

"Decision of the commissioners was made by a tribunal with full powers to examine and decide, and inasmuch as there is no provision for an appeal to any other jurisdiction, the decision must in general be regarded as final in all collateral proceedings." It may be inferred from the last expression, "collateral proceedings," that the court had in mind one of the direct remedies, by scire facias or bill in equity, hereinafter suggested, as the proper one for repealing a fraudulent patent.

That by the act of Congress, February 21st, A. D. 1793, entitled "An act to promote the progress of the useful arts," &c., (section 10,) it was provided that the judge of the district court where the patentee, his executors, administrators, or assigns resided, might, upon due application and proof that a patent had been obtained under that act, surreptitiously, or upon false suggestion, render judgement for the repeal of such patent.—(See Law's Digest of Patent Laws, acts, page 40.)

44 That by the act of Congress of July 4th, A. D. 1836, entitled "An act to promote the progress of the useful arts, and to repeal all acts and parts of acts heretofore made for that purpose," the aforesaid act of Feb'y 21st, A. D. 1793, was repealed, and the provision contained in said section 10 thereof was not re-enacted, and no statutory provision now exists for the repeal of patents obtained by fraud.—(See Law's Digest of Patents, acts, page 48.)

That there appears to be no remedy in such case provided, whereby individuals or the public may be redressed in the matter of a fraudulent patent, unless it be by scire facias, (as in England,) or by a bill in equity in the name of the United States to repeal the patent.

In England, scire facias is a writ of right for the repeal of fraudulent patents, for preventing multiplicity of suits, and for the general relief of the public. It is brought in the name of the Queen in behalf of the individual aggrieved, or of the public, and "every person is pre-
45 sumed to have such an interest in a patent for an invention, that if he alleges that it is illegal or void, he is entitled as of right to a scire facias in the name of the Queen in order to repeal it."—(See Hindmarch on Patents, title scire facias, section 6.)

As to the remedy of a bill in equity in the name of the United States, at its present term, (December T., 1864,) in the case of Stone vs. the United States, (No. 7,) decided that this is the proper remedy for repealing a patent for land surreptitiously obtained. In that case the court said:

A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or title, until it is set aside or annulled by some judicial tribunals. In England this was originally done by scire facias, but a bill in chancery is found a more con-

venient remedy. Nor is fraud in the patentee the only ground upon which a bill will be entertained.

Patents are sometimes issued unadvisedly or by mistake, where the office has no authority in law to grant them, or when another
46 party has a higher equity and should have received the patent. In such case the courts of law will pronounce them void.

The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially.

If he issues a patent for land received for (from?) sale by law, such patent is void, for want of authority, but one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgement of a court.

In connection with this case, I beg to call your attention to the opinion of your predecessor on the subject, and more especially to that of Mr. Attorney General Legare, which recognizes the right of redress in such case, either by scire facias or a bill in equity, but with inclination of opinion in favor of the latter.—(Opinions, Volume IV, page 120.)

Your memorialist, therefore, respectfully asks that you will cause, permit, or consent to the initiation of proceedings for his relief, and that of the public in the name of the United States, for the repeal of the
47 renewal and extension of the said Goodyear patent so fraudulently obtained, either by scire facias or bill in equity, as in your judgment may seem best.

A. O. BOURN.

RHODE ISLAND DISTRICT, *ss:*

In the city of Providence, in said district, personally appeared A. O. Bourn, and made solemn oath that the facts and statements set forth in the above memorial are true, so far as they are stated of his own knowledge, and so far as they are stated on information and belief he believes them to be true.

Before me the 20th day of February, A. D. 1865.

JAMES H. PARSONS,
U. S. Commissioner for said R. I. District.

[5-ct. int. rev. stamp canceled: "J. W. P., Feb. 20, '65."]

Respectfully referred to the Commissioner of Patents.

JAMES SPEED,
Att'y General.

48 (Indorsed:) U. S. circuit court. The United States of America, ex rel. Augustus O. Bourne, vs. Charles Goodyear, ex'or, &c. Amendments to bill of complaint. F. M. Bangs, complainant's solicitor. Filed Nov. 10, '68.

49 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall, in the city of New York, on , the eleventh day of November, in the year of our Lord one thousand eight hundred and sixty-eight:

Present, the Honorable Chas. L. Benedict, district judge.

THE UNITED STATES OF AMERICA, *ex rel.* Augustus O. Bourn,
vs.
CHARLES GOODYEAR, Jr., executor of the last will & testament of Charles Goodyear, deceased.

The above-entitled cause came on to be heard upon the demurrer to

the bill filed by Charles Goodyear, jr., executor of the last will and testament of Charles Goodyear, deceased, and the court, having heard the counsel for the plaintiff, and they consenting thereto, do order and decree that the said demurrer be allowed and sustained and adjudged sufficient; and that on the said demurrer, filed by said Charles Goodyear, jr., executor, the said bill be dismissed with costs to said Charles Goodyear. jr., executor, to be taxed by the clerk.

Entered as the decree of this court, per order thereof, this 7th day of Nov., 1868.

CHAS. L. BENEDICT.

Endorsed: Decree dismissing bill, &c.
Filed Nov. 11th, 1868.

50 In the circuit court of the United States for the southern district of New York.

THE UNITED STATES OF AMERICA, *ex rel.* Augustus O. Bourn,
vs.
CHARLES GOODYEAR Jr., executor, &c.

To the judges of the said circuit court:

Your petitioners, the United States of America, and the said relator, Augustus O. Bourn by Francis W. Bangs, their solicitor, humbly complaining, respectfully represents, that the said United States of America, on the relation of the said Augustus O. Bourn, are complainants in the above-entitled cause; and that your petitioners are aggrieved and injured by a decree made by said circuit court in equity, in this cause, bearing date the eleventh (11) day of November, one thousand eight hundred and sixty-eight (1868.)

And your petitioners pray and demand an appeal to the Supreme Court of the United States from said decree made as aforesaid,
51 and pray for a citation according to law; and that the amount of penalty of bonds for costs of said appeal may be fixed by this court or a judge thereof.

And your petitioners will ever pray, &c.
New York, November 11, 1868.

FRANCIS N. BANGS,
Solicitor.

(Indorsed:) U. S. circuit court for the southern district of New York. The United States of America, ex rel. Augustus O. Bourn, vs. Charles Goodyear, jr., executor, &c. F. N. Bangs, solicitor.

NOV. 14, 1868.

Appeal allowed. Appellant to give bonds with sureties to be approved by a judge of this court, &c.

S. NELSON.

Filed Nov. 14, '68.

52 United States circuit court.

THE UNITED STATES OF AMERICA, on the relation of Augustus O. Bourn,
against
CHARLES GOODYEAR, Jr., executor, &c.

Know all men by these presents, that we, Augustus O. Bourn, of Providence, in the State of Rhode Island, and Henry G. Norton, of the

city, county and State of New York, are held and firmly bound unto Charles Goodyear, junior, executor of the last will and testament of Charles Goodyear, deceased, in the sum of five hundred dollars, ($500,) lawful money of the United States, to be paid to the said obligee, his successors, executors, administrators, or assigns, for which payment [payment] well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this thirteenth day of November, one thousand eight hundred and sixty-eight.

Whereas the United States of America, on the relation of said Augustus O. Bourn, is about to prosecute an appeal to the Supreme
53 Court of the United States, to reverse the decree sustaining the demurrer in this cause, which decree was made in the above-entitled suit, by the circuit court of the United States for the southern district of New York, in the second circuit, on the eleventh (11) day of November, one thousand eight hundred and sixty-eight, (1868:)

Now, therefore, the condition of this obligation is such, that if the said appellant shall prosecute the said appeal to effect, and answer all damages and costs; if they should fail to make their appeal good, then this obligation to be void otherwise to remain in full force and virtue.

AUGUSTUS O. BOURN. [s. s.]
HENRY G. NORTON. [s. s.]

Sealed and delivered in the presence of—
C. BURNHAM.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Augustus O. Bourn and Henry G. Norton, being duly severally sworn, do depose and say, and each for himself saith, that he, the said
54 Augustus O. Bourn is a residence of the city of Providence aforesaid, and that he, the said Henry G. Norton, is a resident of the city of New York, as aforesaid; and that they are respectively freeholders within the State of New York, and each for himself says that he is worth the sum of one thousand (1,000) dollars over and above all his debts and liabilities, and over and above all exemptions of his property from sale and execution.

AUGUSTUS O. BOURN.
H. G. NORTON.

Sworn to before me, this 13th day of Nov., 1868.
GEO. F. BETTS, *U. S. Com'r.*

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

On this 13th day of November, one thousand eight hundred and sixty-eight, (1868,) before me personally appeared Augustus O. Bourn and Henry G. Norton, known to me to be the same persons described in, to execute the above bond, and to acknowledge to me that they executed the same.

GEO. F. BETTS,
55 *U. S. Com'r for the Southern District of New York.*

(Endorsed:) U. S. circuit court. The United States of America, ex rel. of Augustus O. Bourn, ag'st Charles Goodyear, executor, &c. Bond. F. W. Bangs, sol'r.

Approved as to form & manner of execution & as to sufficiency of justice.

Nov. 14, 1868.

S. NELSON.

Filed Nov. 14, '68.

56 The United States of America to Charles Goodyear, jr., executor of the last will and testament of Charles Goodyear, deceased:

Your are hereby cited and admonished to be and appear at a Supreme Court [at a Supreme Court] of the United States, to be holden at Washington on the first (1) Monday of December next, pursuant to an appeal in the circuit court of the United States of America for the southern district of New York, wherein the United States of America, upon relation of Augustus O. Bourn, are appellants, and you are appellee, to show cause, if any there be, why the decree passed against the said United States of America, on the relation of the said Augustus O. Bourn, should not be reverted, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, the 14th day of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the ninety-second (92.)

S. NELSON.

57 (Indorsed:) U. S. circuit court. The United States of America, ex rel. of Augustus O. Bourn, ag'st Charles Goodyear, executor, &c. Citation. F. N. Bangs, sol'r.

Filed Nov. 17, '68.

Due service of a copy of the within notice is hereby admitted.

New York, Nov. 16, 1868.

WM. E. CURTIS,
Sol'r for C. Goodyear.

Supreme Court of the United States.

UNITED STATES *ex rel.* A. O. BOURN, Appellants.
vs.
CHARLES GOODYEAR, Executor.
No. 167.

BRIEF AND POINTS FOR APPELLANTS.

CASE.

On the 15th day of June, 1844, letters patent were granted to Charles Goodyear for a new and useful improvement in India-rubber fabrics. This patent was reissued December 25, 1849. It was extended by the Commissioner of Patents as reissued June 15, 1858, and again reissued to the defendant, executor, November 20, 1860.

This suit was commenced in the name of the United States, at the relation of Augustus O. Bourn, in the southern district court of New York, in which the defendant resided. The bill sets forth the granting of the original patent, its reissue, the extension, the death of the original patentee, the appointment of the defendant as executor, and the issue of letters testamentary to him by the surrogate of the city and county of New York, and the subsequent reissue of the patent to him as executor. It then avers that the extension of the patent was procured by fraud. That fraud consisted in false and fraudulent representations made by the patentee to the Commissioner of Patents; in the fraudulent concealment in his accounts, by the patentee, of large sums of money received by him prior to June 15, 1858, as bonuses and tariffs

for licenses under the patent, whereby the Commissioner was deceived; and in connivance and collusion between the friends and certain pretended opponents of the patent, resulting in the suppression of facts, which, if known to the Commissioner, would have justly and legally prevented the extension, whereby also the Commissioner was deceived. The bill prays that the extension may be declared void by reason of the fraud practiced upon the Commissioner, and that the certificate of extension be delivered up to be cancelled.

The bill was subsequently amended, after motion and by leave of the court. The amendments set forth that the relator had made application to the Attorney General of the United States, requesting that he would cause, permit, or consent to the initiation of proceedings having the same object as that sought to be accomplished by this suit, which application was referred to the Commissioner of Patents. Copies of the memorial and the correspondence with the Attorney General, and between him and the Commissioner of Patents, are annexed as exhibits. And the amendments also show that a bill precisely similar to this had previously been filed in the Connecticut district, under the supposition that the defendant was a citizen of that State, and that, the defendant having filed a motion to dismiss the same, on the ground that he was a citizen of New York, the suit was withdrawn.

The bill as amended was demurred to upon these grounds: 1st, want of equity; 2d, that the court had no jurisdiction of the matters complained of and prayed for; 3d, that the alleged cause of action set forth in the bill did not accrue or arise, nor did the discovery of the facts constituting the supposed cause of action happen, within five years before the commencement of the suit; 4th, that the term for which the letters patent mentioned in the bill were granted had expired before the commencement of the suit.

The demurrer was sustained *pro formâ*, without argument on either side, and an appeal taken to this court.

POINTS.

I. The bill is brought for the purpose of setting aside the Goodyear patent, on the ground of fraud in the procurement of the extension thereof. It is properly brought, in accordance with the rules which define the remedy in such cases. The court has full jurisdiction in the premises.

In the case of the Providence Rubber Company *vs.* Goodyear, executor, heard and decided at this term of the court, the fraud in the procurement of the extension of the Goodyear vulcanizing patent was earnestly urged as good defense to the suit which was brought by the patentee for infringement. It was, however, held that that question was not open, and that a patent, or the extension of a patent, could not be attacked in any collateral proceedings, except in cases provided for in section 16 of the act of 1836. On this, as on other points, the court affirmed the decision of Mr. Justice Clifford, in the circuit court for the Rhode Island district.

After the last-named decision had been made the present suit was commenced, and the question presented by the record is, whether the fraud in the procurement of the extension of this patent can be investigated and the patent cancelled and declared void in a proceeding instituted in the name of the United States at the relation of one of its citizens directly for that purpose.

This court has repeatedly held that a bill in equity will lie to set aside a land patent for fraud.

See Field *vs.* Seabury, 19 How., 331, and the more recent case,
United States *vs.* Stone, 2 Wall., 535.

It is also plain that fraud practiced in the procurement of the extension of a patent for an invention is not without remedy, and is properly the subject of judicial investigation in some form of proceeding.

The decision of the Commissioner as to the regularity of the proceedings before him on an application for an exten-

sion is conclusive, *except, perhaps, in case of fraud, which is an exception to the general rule.*

Colt *vs.* Young, 2 Blatch., 473.

"In respect to an extension, the law makes the Commissioner the judge of the merits of the patentee and the existence of the legal grounds for an extension, *and in the absence of fraud* his adjudication is conclusive."

Clum *vs.* Brewer, 2 Curtis, 518.

What is the remedy for such fraud, and what proceedings should be had for the impeachment of a patent extended by fraud?

By section 10 of the act of 1793 (1 Stats., 318) it was provided, that the judge of the district court where the patentee, his executors, administrators, or assigns resided, might, upon due application and proof that the patent had been obtained under that act surreptitiously or upon false suggestion, render judgment for the repeal of such patent. And proceedings were had in the courts under this provision.

(See Law's Digest of Copyright and Patent Laws, p. 94, notes.)

This act was, however, repealed by the act of 1836, (5 Stats., 117,) and the said 10th section not re-enacted. There is now no statutory provision for the repeal of patents obtained by fraud.

In England *scire facias* is a writ of right for the repeal of fraudulent patents, for preventing multiplicity of suits, and for the general relief of the public. It is brought in the name of the Queen, in behalf of the individual aggrieved or of the public, and "every person is presumed to have such an interest in a patent for an invention, that, if he alleges it is illegal and void, he is entitled as of right to a *scire facias* in the name of the queen, in order to repeal it."

Hindmarch on Patents, tit. *Scire Facias*, section 6.

Mr. Justice Clifford, in his opinion in the case of Goodyear *vs.* Providence Rubber Company, at the circuit, says

that the decision of the Commissioner "must be regarded as final in all collateral proceedings."

Mr. Justice Swayne, delivering the opinion of this court, affirming that just cited, uses this language:

"The law made it the duty of the Commissioner to examine and decide. He had full jurisdiction. The function he performed was judicial in its character. No provision is made for repeal or review. His decision must be held to be conclusive, until the patent is impeached in a proceeding had directly for that purpose, according to the rules which define the remedy, as shown by the precedents and authorities upon the subject."

Earlier in the opinion he says that a review of the acts of Congress "furnishes a strong implication that it was the intention of Congress not to allow a patent to be abrogated in any collateral proceeding * * *; but to leave the remedy to be regulated by the principles of general jurisprudence. To those principles we must look for the solution of the question before us."

He then cites and comments on the case of Jackson *vs.* Lawton, (10 Johns., 23,) in which Chancellor Kent decided that where the fraud or other defect in a land patent arose on circumstances *dehors* the grant, the grant is voidable only by suit, and that the regular tribunal is chancery, founded on a proceeding by bill or information.

Mr. Justice Swayne then adds: "The patent in that case was for land, *but as regards the point here under consideration there is no distinction in principle between such a patent and one for an invention or discovery. If there be, the case is stronger as to the latter.* In the case of Field *vs.* Seabury (9 How., 332) the patent was for land. The court ruled the point in like manner, and the same remarks apply. Viewing the subject in the light of the principle involved, we can see no defect in parallelism between that case and the one before us."

This suit is brought in the name of the United States at the relation of one of its citizens, who has suffered in his own business and has been aggrieved in common with the public

by the fraud in the procurement of the extension of the Goodyear patent of 1844.

Application was made to the Attorney General, as appears from the record, that he would cause, permit, or consent to the initiation of proceedings, for the relief of the complainant and the public, for the repeal of the patent. That consent was not given. (Record, pp. 16–17, fol. 38, *et seq.*)

But we submit, that the right of the complainant to maintain this suit in the name of the Government, at his own relation, and in behalf of the public, is not at all affected by the withholding of such consent. In England, as we have seen, *scire facias* is a writ of right, to which any one is entitled, to repeal a patent fraudulently obtained. "Every person is presumed to have such an interest in a patent for an invention" here as well as in England as to entitle him to its repeal if it be fraudulently obtained.

And, moreover, the Attorney General was not a necessary party, nor was his assent necessary.

Suits to vacate patents in which the State was not a party have been sustained.

The objection of non-joinder was specifically taken in the case of Hoye *vs.* Johnston, (2 Gill., 319, and overruled.)

See also Garretson *vs.* Cole, 1 H. & J., 370.

West *vs.* Janet, 1 H. & J., 538.

We claim, then, that this suit is properly brought, that it is fully within the jurisdiction of the court both as regards parties and subject-matter, and that, "according to the rules which define the remedy, as shown by the precedents and authorities upon the subject," the complainant is entitled to relief against the fraud in the extension in this, which is a "proceeding had directly for that purpose."

II. It is made a ground of demurrer that the cause of action set forth in the bill did not accrue, nor did the discovery of the facts constituting the cause of action happen, within five years before the commencement of the suit.

This suit is not in any sense in the nature of a writ of error or an appeal.

It is not brought to reverse or review the decision of the Commissioner of Patents. It is not pretended that that decision was erroneous in any respect upon the facts as they were presented to that office.

The proceeding is brought to cancel and declare void an existing grant procured by the fraud of misrepresentation, concealment, suppression, collusion, and connivance, practiced by those to whom it was made.

It assuredly will not be claimed that a court of equity will not decree relief against fraud because of the mere lapse of five years before suit brought.

It has too often been held, in this as in every court, that as fraud vitiates all transactions, so lapse of time is no bar to relief against it.

III. The fourth ground of demurrer is, that the term for which the Goodyear patent was extended had expired before this suit was commenced.

a. This allegation is incorrect in fact and law.

The averment in the bill is, that on the 15th day of June, 1858, the Commissioner of Patents granted "to said Goodyear an extension of said letters patent of June 15, 1844, as reissued December 25, 1849, for the further term of seven years *from the 15th day of June*, 1858.

The bill was filed June 15, 1865, and service of the subpœna made the same day.

Record, p. 8, fol. 16; p. 9, fol. 18.

A bill precisely similar to this had been filed in the Connecticut district, May 15, 1865, under the belief, on the part of the relator, that the defendant was a citizen of that State. He had, in fact, resided there after his appointment as executor, as had his testator, the patentee. A motion to dismiss on the ground that he was a citizen of New York was filed by the defendant and the suit discontinued.

Record, p. 15, fol. 36.

The patent was, however, outstanding and unexpired at the date of the suit commenced in New York, as well as at that of the suit commenced in Connecticut.

In computing time from a date, or from the day of a date, the day of the date is to be excluded.

Angell on Limitations, 53 and note.
4 Kent's Comm. 10th ed., 107, note 2.
Henry v. Jones, 8 Mass., 455.
Sheets v. Selden's Lessee 2 Wallace, 190.

b. Further: If the extension of this patent was fraudulent, it was void *ab initio*. And all that can grow out of it or come from it is tainted with the fraud.

The patentee enjoyed the privileges of an enormous monopoly during the period covered by the extended term. The expiration of that term cannot prevent his recovering bonuses and tariffs unpaid, or damages for infringements committed prior to its date. He has sued for damages for alleged infringements in the federal courts, and some of the suits have been the subject of consideration by this tribunal.

Yet, if the extension be void for fraud, all these claims of the patentee are wholly unfounded, and his right to recover anything absolutely gone. Indeed, such right never existed.

The expiration of the term of a grant which is fraudulent is no bar to relief against claims arising by virtue of that grant. Such claims are as unfounded as the grant itself. They are part of the fraud; they are its direct results. In them the fraud continues to exist. It is against a plain, palpable existing fraud that this bill asks relief.

IV. The demurrer of the defendant, Charles Goodyear, executor, should be overruled.

J. H. Parsons,
A. Payne,
C. Cushing,
For Appellants.

Wm. J. Read, Law and Job Printer, 111 Fulton Street, New York.

Supreme Court of the U. S.

No. 380.

THE UNITED STATES, *ex rel.*, AUGUSTUS O. BOURN,
Appellant,
vs.
CHARLES GOODYEAR, Jr., Executor of CHARLES GOODYEAR, deceased,
Respondent.

Brief and Points to sustain Demurrer of CHARLES GOODYEAR, Executor, &c.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The References are to the printed pages of the Record.

BRIEF AND POINTS.

The Bill was filed and the suit commenced, June 15, 1865, pages 8 and 9. The Bill states the issuing of Letters Patent to Charles Goodyear, on the 15th day of June, 1844, their subsequent surrender and re-issue to him for the term of fourteen years, from the 15th of June, 1844, and their extension for the further term of seven years

from the 15th of June, 1858, and then their surrender by the defendant, Charles Goodyear, his executor, and the issue to him of two patents for the unexpired term of the extended patent. Pages 1 and 2.

The Bill then alleges that Charles Goodyear, deceased, by misrepresentations deceived the Commissioner, and fraudulently induced him to grant the extension of June 15, 1858, and then prays that the extension and the two new patents issued to the executor for the unexpired term of the extension may be declared void. Pages 3 to 9.

Though the suit purports to be by the United States, *ex relatione*, the amendments to the Bill show that it is not brought at the instance of the Government, or with its consent, and that it is not conducted by or carried on in the name of the Attorney General. Pages 15 to 19.

The defendant filed a demurrer to the Bill, November 6th, 1865, which came on to be heard, November 7, 1868, and which, *upon the plaintiff consenting thereto*, was sustained and adjudged sufficient, and so appears in the decree now appealed from dismissing the Bill. Page 20.

POINTS.

I.—The decree appealed from having been made upon the consent of the appellants, which is a part of the record, they are are precluded from questioning it, or reviewing it by appeal. Page 20.

(*a*) The Court upon appeal will not entertain the application of a party who seeks to impeach a decree which is the result of his own consent or stipulation. He is estopped by his own act from contesting it on appeal.

(*b*) It is contrary to the settled practice of all appellate courts of final jurisdiction to review judgments made upon the consent or stipulation of the appellant. It in effect compels the appellate court to hear and determine a cause *ab origine*.

(*c*) Justice to suitors and grave reasons of public policy require adherence to this rule.

II.—The Bill shows that the relator has no interest in the subject matter of the action, and no proper title to institute a suit concerning it; and that it is not brought by the authority or consent of the Government; and that it is not conducted by or carried on in the name of the Attorney General; and upon its face it discloses a proceeding wholly unprecedented, and which should not be sustained or favored. Pages 8, 16, 17.

Story on Eq. P., §§ 8, 49.

(*a*) A proceeding of this character by the United States, *ex relatione*, cannot be maintained but at the instance of the Government, and the consent of the parties even, will not give jurisdiction.

Wallace v. *Anderson*, 5 *Wheaton*, 291.

(*b*) The protection of the citizen requires that the Courts should not sustain proceedings in the name of the Government, *ex relatione*, which are, as this is, unauthorized by the Government, not conducted by its officers, and perverted to the infliction of a private wrong.

1 *Stat. at Large*, 93, § 35.

III.—The extension of the Patent sought to be vacated expired June 14, 1865. This suit was commenced June 15, 1865. The extension was for the term of seven years from June 15, 1858. Page 17, *Amendments to Bill.*

A present interest commenced on the 15th of June,

1858, and, consequently, the 15th of June, 1865, when this suit was commenced, was excluded from the term of seven years. The law recognizes no parts of a day, and the 15th of June, 1858, being a part of the term of seven years, the extension could not extend into the 15th of June, 1865.

Pierpont v. *Graham*, 4 *Wash. C. C. R.*, 232.

Hence, the extension having expired before the bill was filed, there is no equity to support the bill.

(*a*) The relator sets up no equities in the bill, the government has no interest in the matter, and sets up none, and there is no equity to support the application to set aside the extension of a patent that is wholly deprived of life and value, and has ceased to exist. It is the position of a lessor asking to have an expired lease, which is wholly valueless, set aside without alleging any ground or reason for the request, or possible interest in the matter.

(*b*) If the relator or the government had any interest in the matter, it should have been alleged in the bill, or some reference made to it, but none is even professed.

IV.—It appears, upon the face of the bill, that the suit is barred by the lapse of time, and if the defendant is within any of the exceptions of the statute, the complainant must state the fact in his bill.

5 *Stat. at Large*, 322, § 4.
Story Eq. P., § 484–485.
Humbert v. *Trin. Church*, 7 *Paige*, 195.
Van Hook v. *Whitlock*, 7, *Paige*, 273.

(*a*) If a bar might not be good in a court of law, by

reason of a lapse of time, yet a Court of Equity might, nevertheless, sustain it, for it never administers to state claims, or encourages gross laches.

Story Eq. P., § 485.

V.—The law makes the commissioner the judge of the merits of the application for the extension, and if the court has power to determine that his adjudication shall not be conclusive, the present case is not one where such power should be exercised.

5 *Stats. at Large*, 121, § 18.
9 " " 231, § 1.

VI.—The demurrer of the defendant, Charles Goodyear, executor, should be sustained, and the judgment appealed from should be affirmed with costs.

E. W. STOUGHTON.
WM. E. CURTIS,
of counsel for defendant,
CHARLES GOODYEAR, executor of Charles Goodyear, deceased.